

6-1-1988

## Testimony of Professor Burt Neuborne New York University Law School before the Subcommittee on Oversight of the House Judiciary Committee March 19, 1987

Burt Neuborne

---

### Recommended Citation

Burt Neuborne, *Testimony of Professor Burt Neuborne New York University Law School before the Subcommittee on Oversight of the House Judiciary Committee March 19, 1987*, 21 Loy. L.A. L. Rev. 1099 (1988).  
Available at: <https://digitalcommons.lmu.edu/llr/vol21/iss4/10>

This Symposium is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact [digitalcommons@lmu.edu](mailto:digitalcommons@lmu.edu).

**TESTIMONY OF  
PROFESSOR BURT NEUBORNE  
NEW YORK UNIVERSITY LAW SCHOOL  
BEFORE THE SUBCOMMITTEE ON  
OVERSIGHT OF THE HOUSE JUDICIARY  
COMMITTEE MARCH 19, 1987**

Mr. Chairman and members of the subcommittee:

Thank you for the opportunity to discuss with you one of the relatively little-known, but extremely significant, institutions in American life—the office of the Solicitor General. As the government’s lawyer in the Supreme Court and as the government’s principal appellate advisor, the Solicitor General’s office plays a critical role in the legal process. I am particularly honored to appear on a panel with a respected figure in American law whom I have long admired, both as Dean when I attended Harvard Law School and as the Solicitor General whom I first encountered as an American Civil Liberties Union lawyer—Dean Erwin Griswold. Dean Griswold set standards as Dean and as Solicitor General that remain benchmarks of quality and dedication.

My perspective on the Solicitor General’s office is somewhat unusual. I have never worked for the Solicitor General. Indeed, for most of my professional life, I have opposed the Solicitor General’s office on behalf of the American Civil Liberties Union. From 1967-1972, I served as staff counsel for the New York State affiliate of the American Civil Liberties Union and opposed the Solicitor General on numerous occasions, including the Pentagon Papers case and cases raising many of the legal issues precipitated by the Vietnam War. From 1972-1974, I served as Assistant Legal Director of the American Civil Liberties Union, with substantial responsibility for Supreme Court litigation. Most recently, I served as National Legal Director of the American Civil Liberties Union from 1982-1986 and devoted substantial energy to opposing the Solicitor General’s office on a broad range of issues, including free speech, affirmative action, racial discrimination, abortion rights, criminal procedure, religious freedom and the separation of church and state. No one could mistake me for a neutral observer. I hope, though, to offer comments on the Solicitor General’s office that rise above my usual roles as advocate for libertarian values and a member of the loyal (and vocal) opposition.

Although it sounds almost quaint these days, immersed as we are in a cynical version of legal realism that teaches that Supreme Court adjudications are just another extension of politics, I believe that the Solicitor General's office—like the great institution it serves, the Supreme Court, should function at a level of principle that minimizes, even if it cannot eliminate, the influence of politics and partisan ideology on the growth of law. I believe that the principal task of the Solicitor General's office is to provide the Executive branch and the Supreme Court with technically excellent advice about the meaning and logical application of existing law. I do not believe that the talent and prestige of the Solicitor General's office should be expended in sustained ideological attempts to push the law in a particular direction. Not surprisingly, given my background, I believe that there is a role for ideological lawyers in the Supreme Court, but I do not believe that the Solicitor General's office should play such a role.

It is impossible to hazard an appraisal of any Solicitor General without positing a theory of the role of the Solicitor General's office. At the risk of hubris (and oversimplification), I believe that a Solicitor General must seek to fulfill at least two potentially conflicting sets of responsibilities.

The Solicitor General's most obvious responsibility is that of the President's lawyer in the Supreme Court. After all, the President appoints the Solicitor General, who, as a matter of hierarchical responsibility, is obliged to execute the will of the Executive branch. Moreover, almost all litigation involving the United States has, as the nominal party, a member of the Executive branch. It is tempting, therefore, to think of the Solicitor General as nothing more than a particularly elegant "mouthpiece" for administration policies in the Supreme Court.

Even at the level of acting as the government's Supreme Court lawyer, though, at least two complexities complicate the simplistic "mouthpiece" model. First, as the government's Supreme Court lawyer, a Solicitor General represents more than just the President or, even, the current administration. The Solicitor General represents Congress as well, to say nothing of the career civil service and the independent administrative agencies. Indeed, in a democracy, the Solicitor General represents more than just the flesh and blood persons who happen to hold high office; the Solicitor General represents the people as well. Second, even if one confines the Solicitor General's conception of "client" to the current administration, the attorney-client bond that exists between the Solicitor General and a government official is infinitely more complex than the analogous private relationship. Unlike a private lawyer with a

powerful client, whose principal task is to effectuate the client's wishes within the bounds of ethical behavior, the Solicitor General has, I believe, a greater duty to influence his clients' actions to assure that government behavior conforms to existing law.

Both sets of complexities put obvious strain on the mouthpiece model and create potential tensions between the Solicitor General and the President. When a Solicitor General views his or her "client" more broadly than the parochial needs of a given President and accepts a duty to seek to influence an administration's behavior to assure compliance with existing law, the Solicitor General risks conflict with the President. Such conflict is, I believe, the necessary price for a truly excellent legal, as opposed to political or ideological, voice at the highest level of government.

Moreover, I believe that the Solicitor General serves yet a second institutional master. In addition to serving as Supreme Court advocate for the government, with all the complexities such a task entails, the Solicitor General maintains a critically important ongoing relationship with the Supreme Court. As the principal voice of the United States in the Court, the Solicitor General provides the Court with important raw material for decision and plays a significant role in assisting the Court to set its agenda. When the Solicitor General's office functions optimally, it is the Supreme Court's partner in a symbiotic relationship, as well as an advocate before it.

Anyone purporting to assess the Solicitor General's office must, necessarily, make subjective judgments about the relative importance of the Solicitor General's occasionally conflicting roles. My assessment reflects a subjective belief that the Solicitor General's role as a reliable, non-ideological and, essentially, non-political source of technically excellent advice to the Supreme Court and the President about what the law is (as opposed to what it ought to be), is much more important than the Solicitor General's potential role as a President's mouthpiece engaged in a campaign to push the law in an ideologically-tinged direction.

There is, I repeat, an important role for ideologically motivated lawyers in the Supreme Court. The Court, as an institution, benefits from receiving argument about the philosophical and pragmatic implications of its opinions. Organizations like the American Civil Liberties Union, the NAACP and the Legal Defense Fund, joined in recent years by organizations espousing contrary views about the proper growth of the law, enrich the Court's understanding of the difficult cases before it. It is, however, a mistake for the Solicitor General's office to permit itself to drift into the role of ideologue.

When a Solicitor General abandons the middle of the road and opts for a more ideological approach to the Supreme Court, I fear that the legal system suffers a serious institutional loss. An overly ideological Solicitor General, on either side of the road, forfeits enormous credibility with the Court. When a Solicitor General's office is perceived as shading the law in an effort to nudge the Court in an ideological direction, its briefs lose their special credibility. Instead of being perceived as a neutral, objective voice giving excellent, non-ideological advice on the state of the law, the Solicitor General simply joins a chorus of ideological voices, with no particular claim to credibility or correctness. Moreover, an ideological Solicitor General abandons any pretext of influencing administration behavior to conform to the law. Instead, the Solicitor General becomes an ideological cheerleader for the administration, as concerned with justifying deviations from legal norms as with assuring compliance with law. In place of the symbiotic partnership that should characterize the relationship between the Court and the Solicitor General, an overly ideological Solicitor General engenders the wary skepticism that properly greets ideologues in the Supreme Court.

I have observed the Solicitor General's office closely under Presidents Johnson, Nixon, Ford, Carter and Reagan. Whether the Solicitor General has been Erwin Griswold, Archibald Cox, Wade McCree or Rex Lee, the office has generally functioned as a source of excellent, non-ideological advice on the state of the law. While Solicitor Generals occasionally argued for a change in the law, the briefs filed by the Solicitor General were overwhelmingly devoted to an analysis of existing law and to classic arguments based on logic, analogy and statutory construction. In no sense could they be characterized as the President's "mouthpiece." In no sense did they espouse an ideological agenda.

I sense that in the past several years, the tone and content of the Solicitor General's work has shifted far more toward an ideological stance that views the Solicitor General's office as a vehicle for advancing a particular set of political and ideological positions. Indeed, over the past two years, it would be difficult to differentiate the Solicitor General's work from avowedly ideological organizations on the left and the right that bombard the Court with legal analyses designed to advance a given set of values. It is almost as if the Solicitor General had decided to function as a counter-ACLU. As I have noted, it is a good idea for the Court to have access to arguments made by groups at all points on the spectrum; but it is a great loss to use the Solicitor General's office to perform that function.

I want to stress three points, lest my criticism be misunderstood.

I do not suggest that the technical competence of the Solicitor General's office has declined. The current Solicitor General, Charles Fried, is a brilliant legal scholar. His briefs reflect the same technical excellence that I have come to respect over the past 20 years.

Nor do I suggest that the Solicitor General is being pressured to advance arguments which he believes to be erroneous or unprincipled. I accept at face value his assertions that his unfortunate and unsuccessful attempts to defend a host of indefensible positions, like racially motivated challenges to black jurors and patently unfair attempts to restrict judicial review in Social Security cases, reflect his own views about what the law should be.

Finally, I do not believe that it is an abuse of power for the Solicitor General to shift his emphasis from the traditional role of the office as a middle of the road voice that attempted to render careful legal advice to a far more ideologically charged engine for legal change. The propriety of such a shift turns on the relative importance one ascribes to the Solicitor General's roles as the President's advocate, the President's advisor and the Supreme Court's friend. My assessment is that such a shift to ideology is a serious mistake of judgment, even if, as I believe, it is not an abuse of power.

